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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x  
4 UNITED STATES OF AMERICA

5 v.

22 CR 673 (LAK)

6 SAMUEL BANKMAN-FRIED

7 Defendant

8 -----x

9 New York, N.Y.  
10 August 30, 2023  
11 1:00 p.m.

12 Before:

13 HON. LEWIS A. KAPLAN

District Judge

14 APPEARANCES

15 DAMIAN WILLIAMS

16 United States Attorneys for the  
17 Southern District of New York

NATHAN REHN

DANIELLE KUDLA

DANIELLE SASSOON

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19 Attorneys for Defendant

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20 MARK COHEN

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(The Court and all parties appearing via Teams)

THE COURT: Good afternoon everybody. Let me first make sure we have the reporter on the line.

(Replies)

THE COURT: Perfect.

United States v. Samuel Bankman-Fried.

Counsel for the government, put in your appearances, please.

MR. REHN: Good afternoon, your Honor.

This is Thane Rehn for the United States. We also have on the line Nick Roos, Danielle Sassoon, Danielle Kudla and Samuel Raymond.

THE COURT: Good afternoon, folks.

For the defendant.

MR. COHEN: Yes. Good afternoon, your Honor.

Mark Cohen, Cohen & Gresser, for the defendant.

MR. EVERDELL: Christian Everdell, Cohen & Gresser, for the defendant.

THE COURT: Good afternoon. The sequencing which I would like to deal with the matters we have before us this afternoon are, first of all, the in limine motion, and I propose to talk about the MDC situation, and we will deal with the advice of counsel problem last.

Anybody have a different suggestion? Okay.

MR. REHN: That's fine, your Honor.

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1 THE COURT: Who is going to address it for the  
2 defendant?

3 MR. COHEN: I will, your Honor.

4 THE COURT: Happy to hear you.

5 MR. EVERDELL: Thank you, your Honor.

6 Your Honor, as we set forth in our motion in limine,  
7 the government has consistently missed deadlines that it  
8 represented to the Court that it would make, and they have been  
9 producing voluminous discovery to us just in the last several  
10 weeks and even in the last few days.

11 Your Honor, the last status report the Court gave to  
12 the -- that the government gave the Court on discovery was at  
13 the June 15 hearing, and they said that they still needed to  
14 produce data from Google accounts and slack data from Gary  
15 Wang's laptop. Of course there was still the voluminous  
16 ongoing subpoena returns that kept coming in, and I believe are  
17 continuing to come in.

18 THE COURT: Excuse me. They go to you, that material  
19 or some subset of it goes to you because you asked for it under  
20 Rule 16, right?

21 MR. EVERDELL: Your Honor, yes, it is the burden of  
22 the government to produce what they plan to use and what they  
23 plan to rely upon at trial under Rule 16.

24 THE COURT: Through Rule 16.

25 MR. EVERDELL: Yes, it's Rule 16, your Honor.

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1 THE COURT: And if I remember correctly, that's  
2 reciprocal. They don't have that obligation unless you ask for  
3 it and agree to make some disclosure. Is that right?

4 MR. EVERDELL: I believe that's correct, your Honor.

5 THE COURT: So what you're complaining about there is  
6 that the government has been recently producing to you  
7 materials that you asked, for which in some degree or another  
8 is only now in the government's possession and control as  
9 opposed to having been there all along, right?

10 MR. EVERDELL: Well, your Honor, I think we need to  
11 take a bit of a step back, because I think that we have to  
12 frame the context for why we are here. The reason why these  
13 materials are only coming to the government right now and then  
14 in turn only coming to us is because of the speed at which the  
15 government chose to charge this case. They chose this schedule  
16 that we are on. A lot of these materials --

17 THE COURT: Well, now, that's not exactly -- sir, that  
18 isn't exactly right either. They indicted the case when they  
19 had probable cause to go to the grand jury, and you both came  
20 in at the very first conference and asked for October 5, right?

21 MR. EVERDELL: Yes, your Honor. And, your Honor, this  
22 is where the tension lies because the defendant does have a  
23 right to pick a date for a speedy trial. We chose a date that  
24 we thought would be -- you know, it was certainly an aggressive  
25 date because our client wants to clear his name, and we didn't

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1 choose one that was far out for that reason, but it shouldn't  
2 be the case that if the client and if the defendant wants to  
3 make that choice that then we have to sort of suffer the  
4 consequences of late produced discovery coming to us in order  
5 to keep that trial date.

6 THE COURT: You are not complaining about, as I  
7 understand it, the late produced discovery in the sense that  
8 the government had it and withheld it. You're complaining that  
9 the government got it and turned it over to you, and when the  
10 government got it and therefore turned it over to you, that was  
11 late given the starting date that you all agreed on. Yes?

12 MR. EVERDELL: Yes, your Honor, I -- yes. That is  
13 correct. The fact is because of the way the case was charged,  
14 because the government charged it before they had even  
15 requested a lot of these documents and requested this evidence,  
16 this evidence is now coming to us far late in the game up to  
17 the point where it's now four weeks till trial, and we're still  
18 getting productions of millions of pages, and we should not  
19 what bear the consequences of that decision for the government  
20 to have charged the way that they did, and we are left in a  
21 position where we're bearing the consequences not being able to  
22 actually do a substantive review of these documents in time for  
23 trial.

24 THE COURT: Well, now most of the documents have been  
25 produced in searchable form and with indices, have they not?

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1 MR. EVERDELL: Your Honor, this also butts up against  
2 what our client's current situation is because he needs to be  
3 able to review these documents as well. And right now he's in  
4 jail, and he doesn't have the ability to look at this stuff and  
5 search it in the way he used to before he was out. So we are  
6 faced with a problem of getting documents produced millions of  
7 pages within four weeks to go to trial, and our own client has  
8 no real means to review them, and that -- and we can't be in  
9 that position. He has the right to look at discovery that's  
10 being produced to him being used in the trial against him. And  
11 with the documents we're getting right now, he can't do that.

12 THE COURT: Anything else?

13 MR. EVERDELL: Your Honor, I think it's just that  
14 given how late these were produced, and we have raised this  
15 issue -- one moment, your Honor. I would ask, for example, is  
16 the government planning to make any additional productions at  
17 this point? Because, I mean, we've still gotten a number in  
18 very recently, but there may be more coming. It seems like the  
19 subpoena returns, for example, keep coming in, and they're just  
20 going to keep producing them.

21 THE COURT: Well, do you object to their producing  
22 them? Are you saying now that any other Rule 16 material that  
23 comes into the government's control post today, they have no  
24 obligation to produce?

25 MR. EVERDELL: Your Honor, what I think I'm saying is

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1 that we -- they can't be used at this point at trial because if  
2 we know they're going to be used, then we need to be able to  
3 review them, and we can't review them this late in the game.  
4 This is far too late in the game for us to be able to prepare  
5 and review those documents in time to prepare the defense if  
6 they're going to be used at trial.

7 THE COURT: But you haven't asked for more time.

8 MR. EVERDELL: No, we haven't, your Honor.

9 THE COURT: Well, would you like to?

10 MR. EVERDELL: Your Honor, I don't think we want to  
11 ask for more time currently at the moment. No.

12 THE COURT: Okay. Anything else you want to say on  
13 the subject?

14 MR. EVERDELL: No, your Honor.

15 THE COURT: I had one question for you. At some point  
16 along the way there was a lot of expressed desire on the part  
17 of the defendant to get the FTX code base. Has that been  
18 turned over?

19 MR. EVERDELL: Your Honor, we asked for both a code  
20 base and the code base history, which is the edit history to  
21 the code base. The code base itself was supplied directly, I  
22 believe, by the FTX debtors, but that has to be looked at  
23 online. And so, again, it butts up against the circumstances  
24 that we face where the defendant really can't access that  
25 without looking at it online.

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1 THE COURT: And you have seven expert witnesses, at  
2 least some of whom are capable of understanding the code base,  
3 yes?

4 MR. EVERDELL: Sorry, your Honor. Say again?

5 THE COURT: You have seven expert witnesses you're  
6 proposing, at least some of whom, or one of whom is capable of  
7 looking at the code base and understanding it, yes?

8 MR. EVERDELL: Well, your Honor, it's not a substitute  
9 for the defendant's own review of the code base.

10 THE COURT: You haven't answered the question.

11 MR. EVERDELL: Your Honor, we have people who this --  
12 this code base is a bespoke code base, right?

13 THE COURT: I'm sorry, it's a what?

14 MR. EVERDELL: It's a bespoke code base. The people  
15 who truly understand it best are the ones who designed it,  
16 which are the government's own witnesses. We are working as  
17 best we can with our own experts to understand it and the  
18 defendant, his input on it is critical.

19 THE COURT: And when was that made available to you?

20 MR. EVERDELL: Your Honor, I don't think I have the  
21 date in front of me right now. I can get it for you, your  
22 Honor.

23 THE COURT: Okay. And is this something that's  
24 included in any of the various totals of pages that are in your  
25 letters?



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1 MR. EVERDELL: No, your Honor.

2 THE COURT: Now, you asked for the edit history, you  
3 said. Did you get that.

4 MR. EVERDELL: No, we have not received the code base  
5 history.

6 THE COURT: Does the government have it, as far as you  
7 know?

8 MR. EVERDELL: As far as I know, they have put us  
9 directly in touch with the debtors because they say this  
10 information has to come directly from the FTX debtors, and  
11 that's how we got the -- and so I don't know if they have it or  
12 they don't. I don't think they do.

13 THE COURT: Did you ask them for it?

14 MR. EVERDELL: Yes, we've been asking them for it, and  
15 they have put us in touch with the FTX debtors and said this  
16 has to be produced directly --

17 THE COURT: Did you ask the FTX debtors for it?

18 MR. EVERDELL: Your Honor, we asked the government to  
19 facilitate this for us because they offered to do this on our  
20 behalf, hearing this would be actually the quickest way to get  
21 it from the FTX debtors.

22 THE COURT: Did you ask the FTX debtors for access to  
23 it?

24 MR. EVERDELL: I have to check to see if I have emails  
25 between the FTX debtors on this. I believe I had a

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1 conversation with them about this, and then I asked the  
2 government to facilitate.

3 THE COURT: And whom did you ask specifically?

4 MR. EVERDELL: Your Honor, I have to go back and check  
5 my notes.

6 THE COURT: Anything further from the defense on this?

7 MR. EVERDELL: No, your Honor.

8 THE COURT: Who's going to address it for the  
9 government, please?

10 MR. REHN: I will be addressing it, your Honor.

11 THE COURT: Okay.

12 MR. REHN: Your Honor, as set forth in the  
13 government's letter and response to defendant's motion in  
14 limine, there has been no violation of Rule 16 in this case by  
15 the government.

16 THE COURT: I don't think that they claim that there  
17 is.

18 MR. REHN: We agree, your Honor, but that makes all  
19 the more pertinent the fact that the remedy they're seeking is  
20 preclusion of evidence from trial is completely inappropriate  
21 because courts have found that even in instances in which there  
22 were a Rule 16 violation, the preferred remedy would not be  
23 preclusion. That's an extreme and unusual remedy that's been  
24 applied very rarely in a small number of cases which are  
25 distinguishable for the reasons set forth in our letter.

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1           With respect to the question of the defendant's  
2           ability to prepare for trial on the schedule that the Court has  
3           set, the defense has not actually articulated a particular  
4           prejudice arising from the volume --

5           THE COURT: Well, just so we're clear, as a matter of  
6           formality, I set the date, but you and the defendant came to me  
7           with that date at the first conference, as I remember it, and I  
8           went along with what you both suggested.

9           MR. REHN: That's correct, your Honor. And I think  
10          also it's important to place in context the timing of the  
11          production in this case and the reason why they've been through  
12          some of the schedule they have been. A big part of that is  
13          that the more recent disclosures in particular have been in  
14          large part due to requests made of the government by the  
15          defense. So the large volume of third-party productions, the  
16          largest categories of that are productions from the FTX debtors  
17          of slack messages, which the defense has repeatedly requested  
18          of the government both in writing and in phone calls that we've  
19          had with the defense. And we've gone back to the FTX debtors  
20          to request those productions and now turned them over to the  
21          defense, and the defense is now saying, well, you know, we  
22          don't have the ability to review this in time for trial.

23          So it's a situation where if the defense wanted these  
24          materials, we've made efforts to get them from the debtors and  
25          produce them to them, and they're receiving them on the same

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1 schedule that the government is. We're still more than a month  
2 out from trial. These are text searchable indexed productions  
3 of messages that the FTX debtors produced to us, and there's no  
4 reason why they can't be reviewed for potential -- materials  
5 potentially relevant to trial by both parties in the more than  
6 a month that we have remaining until trial.

7         The next category that the defense highlights are the  
8 Google documents. As we explained in our letter, the vast  
9 majority of the production from Google consists of a production  
10 that was produced by Google to the government pursuant to a  
11 search warrant of the defendant's own Google documents. So  
12 these are materials that the defendant has had access to  
13 throughout the pendency of this case, and indeed before the  
14 pendency of this case, and that the government only recently  
15 came into possession of and produced promptly when it came into  
16 possession of them.

17         So it would be an extremely perverse remedy to suggest  
18 that the defense should be able to preclude the government from  
19 using materials when the defense has had them for many, many  
20 months prior to the government and is presumably preparing to  
21 make use of them for trial itself. So there doesn't seem to be  
22 a real basis for any remedy at all based on the record that the  
23 defense has presented to us with respect to those categories of  
24 documents.

25         With respect to the last thing that the defense

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1 mentioned, the code base history, we have been told by the FTX  
2 debtors that they did provide access to the entire FTX code and  
3 the code base history, what they called a commit history, which  
4 every time somebody updates the code, it commits, so it's  
5 called a commit history. We have no further access beyond what  
6 the defense has to the same code base and history, and so it's  
7 our understanding that it is both the code base and commit  
8 history that the defense has now had access to for some time.

9 THE COURT: Just so we have a clear record, when we're  
10 talking about access, we're talking about electronic access  
11 over electronic connection. Is that right?

12 MR. REHN: That's my understanding, your Honor, yes.

13 THE COURT: And that's true for the government, and  
14 it's true for the defense?

15 MR. REHN: That's correct, your Honor, yes. With  
16 respect to any excerpts of that that we have actually obtained  
17 as documents, those have been produced to the defense promptly  
18 as we received them.

19 THE COURT: All right. Anything further, Mr. Rehn, on  
20 this?

21 MR. REHN: Again, the one thing, just to highlight it,  
22 these are all categories of production that the government  
23 disclosed both to the Court and the defense back in June in our  
24 letter prior to the June 15 conference, and we specifically  
25 discussed at that conference that the slack messages from Gary

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1 Wang's laptop would still need to be processed; that we were  
2 waiting on additional production of documents from Google  
3 search warrant; and that we were receiving additional  
4 third-party productions and producing them as we received them.  
5 So there's been no dilatory behavior by the government or no  
6 surprise to the defense that these particular productions would  
7 be forthcoming as time went by. And so the suggestion that the  
8 defense is somehow surprised by the fact that these have  
9 arrived, as the government stated that they would, we don't  
10 think it holds water.

11 THE COURT: Anything further, Mr. Everdell?

12 MR. EVERDELL: Your Honor, just on that point, it  
13 can't really be that the government says as long as we disclose  
14 that we're going to be producing these documents so late, then  
15 we can so produce them whenever we want and still use them at  
16 trial even when they are produced so close to trial and the  
17 defense has no meaningful way to actually review them before  
18 trial. So I don't see how that --

19 THE COURT: Well, you have text searchable databases,  
20 you have indices. Isn't that true?

21 MR. EVERDELL: We have a database, yes, your Honor,  
22 but what we don't have at this point is the ability to be able  
23 to do this and search this with our client, and that is a  
24 problem for preparing.

25 THE COURT: Well, we'll get to that in due course, but

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1 I am not going to preclude any of this. And I want to be clear  
2 about why. Starting I think in a letter on June 5 and  
3 continuing in the motion the defendant made to preclude the  
4 government from using documents produced after July 1 -- and of  
5 course I'm using documents not only to refer to physical pieces  
6 of paper but information in electronic form also -- and then  
7 still further in its letter of August 28, the defense complains  
8 that the government recently has produced millions of pages of  
9 documents belatedly and in violation of what it characterizes  
10 as promises by the government and court deadlines.

11 Well, no one, least of all the government, disputes  
12 that it would have been preferable if the documents could have  
13 been produced earlier. The accusations of broken promises and  
14 missed deadlines are not at all accurate. They ignore the  
15 substance of what the government actually said. Moreover, the  
16 defense ignores the fact that the entire document production  
17 made to date, and conceivably parts of which are yet to come,  
18 occurred to discharge the government's obligation to comply  
19 with discovery obligations to the defendant which were created  
20 by the defendant's request for the material.

21 Moreover, the material is produced to the defendant on  
22 request, not to satisfy some urge of the government, but to  
23 further the goal of ensuring that the defendant gets a fair  
24 trial, and the defense ignores the reasons for the delays in  
25 producing some of the documents, consideration of which in my

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1 judgment demonstrate that the nature of the defendant's  
2 complaints of broken promises and missed deadlines show that  
3 it's misleading.

4 To go back to square one -- and I think the defendant  
5 has acknowledged it in this conversation -- the only obligation  
6 on the part of the government was to produce documents in the  
7 government's possession, custody or control pursuant to Rule 16  
8 and the defendant's request. On January 3, the very first  
9 conference I held in this case, the government made a clear  
10 distinction between materials that already were in its  
11 possession, which it expected to produce within the four  
12 ensuing weeks, save for data contained in electronic devices  
13 that were in the government's possession but the contents of  
14 which required extraction and review for privilege and  
15 responsiveness. The likelihood that additional materials would  
16 come into its possession in the days and weeks to come was  
17 clear and unequivocal.

18 There is no claim here that the government failed  
19 promptly to produce any of the materials that were in its  
20 possession last January, but the government was crystal clear  
21 that there were subpoenas and document requests outstanding;  
22 that the investigation was continuing; that it was attempting  
23 to extract and process information from accounts and electronic  
24 devices that it had obtained and would obtain, and that  
25 discovery would continue on a rolling basis.



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1           On March 10, the government advised the defense and  
2           the Court that there were some problems with information that  
3           had not been in the government's possession earlier. One very  
4           large category was Google's slow, and as of that time  
5           incomplete, response to an outstanding search warrant. Another  
6           was difficulties in extracting information from some electronic  
7           devices and then reviewing the extracted information for the  
8           reasons I alluded to. But I set no deadline for completion  
9           because it was impossible to do it. The government did say  
10          that it believed that it would be able to produce the  
11          information from the electronic devices by the end of March and  
12          the material yet to come from Google by the end of April, but  
13          that was an anticipation. It wasn't a promise, and it wasn't a  
14          deadline. I could go on in a lot more detail, but it is  
15          unnecessary.

16          The fact of the matter is that the government kept  
17          both the defendant and the Court fully apprised of the reasons  
18          for the continuing production of these documents that were  
19          coming from non-parties, notably Google, or from extraction  
20          from electronic devices. There is just no evidence at all that  
21          the government didn't act in good faith and didn't make sincere  
22          efforts to expedite the whole process. There is no evidence  
23          that the government inappropriately delayed production of  
24          responsive information once the government had it.

25          On June 5, the defendant complained that a few

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1 categories of expected documents hadn't been produced, and as  
2 the correspondence that's been filed in recent days  
3 demonstrates, most of those complaints -- not all, but most --  
4 have been rendered moot by June 14. Moreover, the government  
5 went to considerable pains, I imagine, to produce all or most  
6 of this material in text searchable and indexed form,  
7 drastically reducing any burden in reviewing it for matters  
8 that were potentially important to the case.

9 Now, most recently the defendant complains that the  
10 government produced another 4 million documents -- I should say  
11 pages -- on August 24 and then 3.7 million more on August 28.  
12 But those complaints are really somewhat misleading. The  
13 government points out that the 4 million pages produced on  
14 August 24 were documents that only recently it obtained from  
15 Google which Google had not previously turned over to the  
16 government as a result of a production error of which the  
17 defendant was advised a long time ago.

18 Even more to the point, the vast majority of these  
19 documents were from the defendant's own Google accounts. They  
20 were therefore documents to which he had independent and  
21 essentially unfettered access until he was detained on  
22 August 11. He, therefore, had months in consultation with  
23 counsel, and whomever else he wanted to be in consultation  
24 with, to review and consider those documents. And he was in  
25 his parents' home with access to a computer and the internet

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1 the whole time.

2 The 3.7 million page production on or about August 28  
3 the government has explained consists very substantially of a  
4 duplicate subset of documents that were produced to the  
5 defendant a few days before. To be sure, I understand that the  
6 defendant claims in its letter of this morning that a little  
7 more than a quarter of those 3.7 million documents were, and I  
8 quote, "additional discovery, most of it from the FTX debtor  
9 entities." But the defendant does not contend that the  
10 government had that additional discovery material, materially  
11 before it produced it. He has given no indication of what the  
12 material contains, whether and why it's important, whether the  
13 defendant had access to all or part of it in the past, or how  
14 he is prejudiced by the government's discharge of its  
15 obligation to turn that material over.

16 So this latest of the defendant's complaints  
17 concerning an alleged deluge of millions of documents is very  
18 seriously exaggerated. He acknowledges that he had access to  
19 at least the vast majority of the 7.7 million documents through  
20 his own Google accounts for months before his bail was revoked,  
21 and to whatever extent there might have been an implication  
22 that the government violated its discovery obligations or  
23 failed to act in good faith, that implication is without merit.

24 Now, I am by no means unmindful about the burdens of  
25 the information age and the proliferation of electronic

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1 devices, and the problems that they can give to counsel and  
2 litigants in cases like this. I'm very much aware of them, but  
3 I have heard absolutely nothing to justify precluding the  
4 government from using evidence that it has lawfully come by in  
5 a good faith effort to satisfy the defendant's Rule 16  
6 obligations and to meet the trial date that the defendant and  
7 the government jointly proposed and adhered to for months and  
8 that the defendant adheres to to this day.

9 Now, I, of course, understand that the defendant  
10 asserts that there is a tension between being ready to go to  
11 trial on October 3 and the sort of review they claim they need  
12 in order to be properly prepared. In some degree, in a  
13 material degree, that's a tension of the defendant's own  
14 making.

15 Nonetheless, if the defendant in good conscience feels  
16 that he needs a postponement, which would be the ordinary  
17 relief that would be granted in the event of a Rule 16  
18 violation -- and there has been none here that I'm aware of --  
19 they can ask for it. I'm not saying I would necessarily grant  
20 it, but they can ask for it. And they will have to demonstrate  
21 if they do so a genuine and unanticipated need, which is not  
22 going to be satisfied, at least not likely to be satisfied,  
23 simply by talking about numbers of pages of documents. That's  
24 a factor to be considered, but there has to be more meat on  
25 those bones to make out the kind of case the defendants are

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1 putting to me.

2 It is also vitally important that if the defendant is  
3 going to do this, they do it by the end of this week. The  
4 deadline for me to request a jury to start a trial on October 3  
5 is September 7. And if we go past September 7, that means we  
6 would have called in a large number of prospective jurors to  
7 pick a jury starting October 3, and any change in the schedule  
8 would be a needless and useless imposition on them and would  
9 certainly weigh against the defense with respect to a  
10 postponement, although I would face it with an open mind  
11 altogether. It would not be the first time a jury panel had  
12 been called unnecessarily, but I take seriously the defendant's  
13 obligation here to move promptly if they're going to move, and  
14 that means by the end of this week.

15 Now, we already have -- and I'm not committing myself  
16 one way or another with respect to where a possible request  
17 might go if it were granted -- a second trial date in this case  
18 which has been held against the possibility that the Bahamas  
19 would grant consent to trying the severed charges. That date  
20 is March 11. Among the options that might be on the table  
21 would be a postponement to March 11, but I am not committing  
22 myself either to granting a postponement or as to the date.  
23 I'm simply putting all the cards on the table so counsel  
24 understands the apparent lay of the land. But that is the way  
25 it looks to me today, reserving all rights.

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1           Okay. As to that, let's go on to the MDC problem.  
2           Who is going to address that for the government?

3           MS. KUDLA: Your Honor, I will. This is AUSA Danielle  
4           Kudla.

5           THE COURT: Let me tell you what the problems are.  
6           I'm sure you know them, but I can't understand why the  
7           defendant as of this morning didn't have hard drives that have  
8           been promised and that were delivered last week. For the  
9           defendant I don't understand the problem with battery life in  
10          the laptop they take to the cellblock when they go the  
11          cellblock because there are batteries, I mean, they have --  
12          they run automobiles, I think they can run laptop computers.  
13          And there is something I found useful in the course of my life,  
14          it's called an extension cord so that you can plug in. I don't  
15          know whether or why that can't be used.

16          I want to come back to the government and say I don't  
17          understand what's going on about the air-gapped laptop that's  
18          been talked about and that apparently hasn't been produced. I  
19          will want to hear from the defense about why they didn't avail  
20          themselves of the opportunity to visit their client in the  
21          cellblock this week on the two days that the marshal service  
22          has been able to make available, and I want to know what  
23          visitation rights counsel have availed themselves of since  
24          August 11 .

25          So let's start with that. That's my list of

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1 questions. Ms. Kudla, you can take the ones that are addressed  
2 to the government.

3 MS. KUDLA: Your Honor, I think let's start with the  
4 air-gapped laptop. That has been delivered to the BOP this  
5 morning, and the issue with that was -- the delay was waiting  
6 for BOP approval to allow the laptop to be admitted into the  
7 MDC. We found that approval on Monday of this week. We  
8 immediately provided counsel with technical specifications that  
9 the laptop could meet. We received that computer this morning.  
10 Our IT staff prepared it for the MDC and delivered it prior to  
11 this conference.

12 The next one that I would --

13 THE COURT: What about moving it from whoever took  
14 possession of it at the MDC to the defendant? I guess it's  
15 going into the visiting room, right?

16 MS. KUDLA: That is correct, your Honor. At this  
17 point in time I know it was dropped off to MDC legal, and my  
18 assumption -- we would have to check with MDC at this point  
19 about whether or not they moved it directly into the visiting  
20 facility, but that is something that we can inquire about. It  
21 will be available, I would like to comment on the hours. The  
22 laptop that has now been provided is available Monday through  
23 Friday 8:00 a.m. to 7:00 p.m. in the visiting rooms and  
24 Saturday and Sunday 8:00 a.m. to 3:00 p.m.

25 And this laptop is equipped with Microsoft Office,

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1 Excel, PowerPoint and Adobe, which are primarily the tools that  
2 are allowing the defendant to record his information  
3 electronically and share that information with defense counsel  
4 through the exchange of hard drives back and forth.

5 And we have also -- that leads me into the next point,  
6 your Honor, about the hard drives if you would like me to  
7 address that.

8 THE COURT: I would, yes.

9 MS. KUDLA: So the hard drives, your Honor, we learned  
10 that the issue about the delivery of the drives through  
11 Mr. Everdell's letter last night and immediately contacted BOP  
12 regarding this issue. They confirmed that the drives were  
13 received on Monday and Tuesday of this week, and that they will  
14 be delivered to the defendant today. Obviously, there was a  
15 gap in time that serves no one's interest, but I think the  
16 effort here is to make sure that the defendant has these  
17 materials immediately and as quickly as possible. And in light  
18 of that, the BOP has agreed to procedures that will expedite  
19 this process dramatically in the future. And what they're  
20 going to be permitting the defendant to do is for counsel to  
21 drop off both drives, as many as they would like, both empty  
22 and filled with defense material, directly to the BOP legal  
23 staff. They will take those drives. They will etch it so it's  
24 a marking that will be tracked, and they will allow counsel to  
25 exchange those drives directly with the defendant at the legal



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1 visitation hours, which, as we went over the hours, are  
2 available seven days a week if they choose to utilize those.

3 So that is with respect to the air-gapped laptop and  
4 the hard drives. I would just like to note that this is a  
5 process in the amount of time that all these procedures have  
6 come together that requires coordination of all parties. So to  
7 the extent there is an issue with the hard drives, such as the  
8 one that defense counsel raised, it is helpful that we become  
9 aware of those as soon as possible so we can alert the BOP and  
10 expedite the process as well.

11 Now, with respect to the battery life, your Honor, on  
12 the battery life issue, this is a process we -- it was put in  
13 place for one week to allow the defendant internet enabled  
14 access. It was raised that there was an issue with the battery  
15 life. We found out that the battery can be replaced, and we  
16 provided defense counsel with the exact requirement for the  
17 ability to purchase a battery for the computer. If we were to  
18 do that, it would take ten weeks for the government procurement  
19 process, so that's why we passed this information along  
20 immediately along to defense counsel to maximize the time and  
21 expedite this as fast as possible. That should enable the  
22 defendant to have approximately four to five hours of time in  
23 the cellblock.

24 Now, you mentioned the point about the extension cord.  
25 Your Honor, we have looked into that. That is a security risk

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1 right now that the U.S. marshals are concerned about,  
2 admittedly so, having lengthy cords inside a cellblock area.  
3 But I want to step back, your Honor, from the technical  
4 requirements and look at basically what this is permitting the  
5 defendant to do, all of these procedures put in place by both  
6 the BOP and the marshal service.

7 He is permitted to review electronic discovery for  
8 approximately 70 hours per week if he wanted to through the  
9 air-gapped laptop that is now at the MDC and through the  
10 internet enabled laptop at the cellblock. He is able on both  
11 of these computers that are equipped with Microsoft Suite  
12 products to electronically record his work product and share  
13 that work product through the exchange of external drives with  
14 his defense counsel. He is able to view, build, edit and share  
15 electronic work product with counsel to assist them. And  
16 counsel has the ability to meet with the defendant seven days a  
17 week. And it's important to note here that this is not a  
18 pro se defendant. The defendant is not preparing his defense.  
19 He has a team of at least six attorneys, five additional legal  
20 staff members and at least seven experts that the government  
21 are aware of that are assisting in the preparation of this  
22 defense. And there is no question is that the defendant's  
23 attorneys and experts are continuing each day to prepare around  
24 the clock, and the defendant can continue to review his  
25 discovery and take notes around the clock as well.

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1           So we believe that, you know, these accommodations are  
2 being set up in coordination with the BOP and the U.S. Marshal  
3 Service, which sometimes takes time to coordinate, but the  
4 moment we become aware of a problem, we assist in trying to  
5 expedite it and find solutions to that to allow the defendant  
6 to take advantage of them in a meaningful way if he so chooses.

7           THE COURT: What about the claim that the internet  
8 access from the cellblock has been difficult?

9           MS. KUDLA: Your Honor, I think that is the one  
10 constraint that is the more challenging to address. We have  
11 tested the laptop from the cellblock. The cellblock does have  
12 internet reception there. It is not the strongest of a 5G  
13 network because the cellblock was never designed to have  
14 internet reception, but it does permit internet-based access to  
15 the relativity database and the AWS database that the defendant  
16 is working on. So in terms of that, it's misleading to say  
17 that there is no internet access. There is --

18          THE COURT: They didn't say that.

19          MS. KUDLA: Your Honor, the issue about trying to  
20 improve the quality of the internet service is something that  
21 we continue to explore, but there are structural issues that  
22 make it complicated. But that said, defense counsel is able to  
23 have their laptops available and provide excerpts of the  
24 materials that they would like the defendant to specifically  
25 review and review that both at the MDC, and they can also

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1 review that together at the cellblock if so desired.

2 THE COURT: Please remind me what floor of the  
3 courthouse the cellblock is on? It's on four, is it?

4 MS. KUDLA: Yes, your Honor I believe that is correct.  
5 It's on the fourth floor.

6 THE COURT: And the defense has made a good deal about  
7 wanting a proffer room that the U.S. Attorney's Office uses.  
8 Where would that be, if it were feasible?

9 MS. KUDLA: Your Honor, if it were feasible, it's on  
10 the fifth floor of the building.

11 THE COURT: Which building?

12 MS. KUDLA: 500 Pearl Street.

13 THE COURT: My recollection, of course, is that the  
14 courthouse does not have Wi-Fi everywhere, and I'm not sure  
15 it's any better on the fifth floor than it is on the fourth  
16 floor.

17 MS. KUDLA: Your Honor, I think we'd have to inquire  
18 into different floors about the internet availability, but I  
19 think one aspect of this that is worth noting and one of the  
20 considerations that goes into this analysis is the resources  
21 that are needed to accomplish it, and the cellblock allows the  
22 U.S. Marshals which are allocated to provide protection to not  
23 only the defendant but all defendants. It allows them to  
24 provide that to the defendant in the area where they are and  
25 also to all defendants that they are monitoring that day.

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1           Moving it to another location within the building  
2 requires the manpower and resources of the U.S. Marshals that  
3 (A) raises concerns regarding the ability of the defendant to  
4 be in a proffer room alone with multiple electronic devices  
5 with his attorneys, who, for a number of reasons, can be  
6 momentarily distracted. There are those security concerns,  
7 along with multiple cords, and then also the manpower needed to  
8 supervise and man that operation by the U.S. Marshal Service  
9 that is designed to protect everyone, not solely the defendant.

10           THE COURT: Thank you, Ms. Kudla.

11           I assume is Mr. Everdell is going to discuss this, or  
12 Mr. Cohen.

13           MR. EVERDELL: That would be me, your Honor.

14           THE COURT: Go ahead.

15           MR. EVERDELL: Thank you, your Honor.

16           So I think what Ms. Kudla said is telling because I  
17 think the devil is in the details here, right? You asked the  
18 question about what about this internet access in the  
19 cellblock, and I think Ms. Kudla quite candidly said, well,  
20 it's not designed for that. It's not really all that great.  
21 I'm paraphrasing, of course, but that is the upshot, right?

22           So while these solutions may appear as if they may be  
23 solutions, they do not pan out in practice. That's what we're  
24 seeing, right? So the problem with the cellblock access, let's  
25 start with that. Up until this point -- I think the government

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1 is proposing to change this, but up until this point it was  
2 simply that the defendant would be able to be produced to the  
3 cellblock twice a week to be able to use an internet enabled  
4 computer to review the discovery that was online. At that  
5 point in the prior weeks up until this point, it didn't have  
6 any capability of recording information; it didn't have a  
7 Microsoft Office Suite; it didn't have any ability for the  
8 defendant to actually look at what he was doing and then make  
9 notes or make work product that he could then bring back to the  
10 MDC. It was simply having a computer in the cellblock. He  
11 could look at things, and then he's got to, I guess remember  
12 it, and go back to the jail and do something with it that he  
13 remembered seeing in the cellblock.

14 And it was a problem, your Honor, because, as  
15 Ms. Kudla points out, the internet access is not viable there.  
16 The two times we tried to use it in the weeks he was produced,  
17 the first week this was available to him, he was produced  
18 Tuesday, and I believe it was Thursday of that week, and both  
19 times the internet went in and out, and it made it totally  
20 ineffective for him to be there and try to review documents  
21 with the internet going in and out.

22 The same thing with the battery life. At that time  
23 there was no power cord. I don't think there's going to be a  
24 power cord because of the safety issue, so you have to rely on  
25 the battery. The first time he showed up, there was I think

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1 only one hour on the battery. He can't bring the laptop with  
2 him. It has to stay with the marshals in the cellblock, so  
3 they are the ones having to remember to charge it. And if they  
4 don't, then we get that problem no matter what battery is in  
5 there.

6 THE COURT: And you could be the ones to bring down  
7 the backup battery when you go down to see him there.

8 MR. EVERDELL: Your Honor, we would be happy to do  
9 that. The problem is that every time we have a procedure like  
10 this, there is always a hitch. We won't be able to -- I  
11 anticipate we will be told we won't be able to give the battery  
12 across to the marshals. There's always something that goes  
13 wrong. For example, when the defendant was first produced,  
14 when he was produced to the cellblock, I guess it was last week  
15 or the week before, he wanted to bring some papers with him,  
16 and the marshals said you can't have papers with you and they  
17 confiscated the papers.

18 Every time there seems to be something that we are at  
19 least trying to work with, in practice it breaks down because  
20 of things that are beyond our control. A random MDC person can  
21 say, I'm not going to give your laptop. You can't bring that  
22 to the cellblock with you or the battery isn't charged. All of  
23 these things have happened and we anticipate will happen.

24 MR. COHEN: Your Honor, if I might, jut to give a  
25 little more context. I know once upon a time your Honor was

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1 yourself a trial attorney, a superb one. This is what happened  
2 to us. We went to cellblock. There are no outlets in the  
3 cellblock for security reasons. We were given a laptop that  
4 was said there is only an hour of charge on it. We asked your  
5 Honor's question, can we get an extension cord, which is a  
6 great question. We were told no. So we were faced with our  
7 client having to be transported for five hours to sit in a cell  
8 where he had limited life of a battery and flickering in and  
9 out internet access. It just wasn't viable for any kind of  
10 real trial preparation. It's not glass. It's a very thick  
11 screen so we can't even write notes that we can show each  
12 other. So having done that for two days, we decided that this  
13 was just not viable. That's why we requested that he not be  
14 produced, and we see him instead at the MDC every day last week  
15 and every day this week someone from our firm has seen him,  
16 usually me or Mr. Everdell or both.

17 It's just in practice, your Honor, we understand that  
18 the Bureau of Prisons says a lot of things and everyone's  
19 experience on this call promises a lot of things just don't  
20 happen. And the weeks tick by and the days tick by and we're  
21 put at a very difficult disadvantage. There is no substitute  
22 for speaking with your client in defending a criminal case.  
23 There just isn't in a meaningful way.

24 MR. EVERDELL: Where that leaves us, your Honor, is I  
25 don't think we have faith that the solutions proposed by



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1 Ms. Kudla are going to work in practice. So we feel like,  
2 especially given the short amount of time leading up to trial  
3 that we have, we've already lost three weeks because, your  
4 Honor, he has not had access to discovery for three weeks. And  
5 now we have only a short amount of time he left. Given that we  
6 foresee that there will be hitches and problems that this will  
7 not work out in practice --

8 THE COURT: Maybe yes or maybe no.

9 MR. EVERDELL: Well, your Honor, given the track  
10 record I think that we have seen so far, we're not trying to  
11 assign blame here, but it's just the practical reality that we  
12 haven't been able to make effective use of our client's time at  
13 least in the cellblock elsewhere, and he doesn't have this  
14 computer yet in the MDC. We really are at the point where we  
15 feel like a temporary release is necessary so that he can  
16 actually prepare for his trial. And that it is -- this is the  
17 type of situation where given the complexity of the  
18 information, the extraordinary volume, and the fact that the  
19 alternatives that we have been trying to reckon with have not  
20 worked out in practice, and the fact that we only have a  
21 limited amount of time before trial starts, that we need him to  
22 be released to temporary release so we can properly prepare for  
23 trial. And I'm happy to discuss with the Court what we think  
24 the contours of that would look like, but we think that we're  
25 at that point and we need that remedy.

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1 THE COURT: Ms. Kudla, anything else?

2 MS. KUDLA: Your Honor, I would just note one point.

3 The defendant prior to August 11, it should be clear, he had  
4 unfettered access to all of the discovery in multiple ways,  
5 including the ability to communicate with his entire team of  
6 attorneys and legal staff and a number of experts. And during  
7 this time he had that ability to communicate through a variety  
8 of means: In-person meetings, telephone calls,  
9 videoconferencing, and electronic document sharing applications  
10 which played into the events of August 11. And that changed  
11 when the defendant improperly -- the defendant had -- there was  
12 a determination that he posed a danger to the community and to  
13 others. And now that is what we're talking about here, and at  
14 this point in time there are a number of procedures in place  
15 very quickly, I might add, that allow him access to review  
16 discovery and to communicate with attorneys seven days a week  
17 up to 70 hours if he so chooses. So, your Honor, the Sixth  
18 Amendment does not guarantee a right to every desire that a  
19 defendant may want, but it's effective assistance of counsel  
20 and to meaningfully participate in a defense, and that's what  
21 we think these accommodations have provided.

22 THE COURT: Okay. I'm not going to rule on this  
23 application now. What I would like is a joint report Tuesday  
24 morning concerning the exact situation at the MDC as of that  
25 time. What's been provided, what's in place, what works; and

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1 if anything doesn't work, I want to know about that too, and we  
2 will see. And, as I say, if there is to be an application for  
3 more time from the defense, it would best be made by the close  
4 of business Friday, but it's not a deadline. I would consider  
5 one made later but with reluctance.

6 Okay. Advice of counsel. I will start out by saying  
7 that I am going to order some disclosure, but I think the  
8 defendant's suggestion that disclosure on this subject might  
9 make more sense after the government's disclosures on  
10 September 8. I think that makes sense. And so I am going to  
11 require that the defendant's disclosures, whatever they turn  
12 out to be, be made on or before September 15.

13 So what I would like to have is a joint proposal by  
14 the close of business Friday as to exactly what disclosures the  
15 defendant will make. If the parties can't agree entirely, I  
16 would like a joint letter setting out what they agree upon and  
17 what they haven't and their respective positions on the areas  
18 of disagreement, and then I will resolve the disagreement over  
19 the weekend, and that will give the defendant time to make  
20 disclosures by the 15th.

21 Now, please understand, I understand I have demanded a  
22 lot from you folks in the last week. You have demanded a lot  
23 from me. That's fine. I'm very appreciative of the efforts  
24 that you have all made on both sides and the zealous and very  
25 capable advocacy on both sides. It's been very helpful, and I

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1 think that's where we stand.

2 Anybody want to raise anything else before we  
3 terminate this?

4 MR. COHEN: Not from the defense, your Honor.

5 MR. ROOS: Your Honor, just one thing from the  
6 government. I don't know your Honor is very aware of this, but  
7 I think in addition to the issue relating to the jury pool  
8 coming in and the need to know promptly an adjournment, which,  
9 by the way, I don't think we think is necessary, and I know the  
10 Court is not expressing an opinion on, but also our 3500 and  
11 exhibits are due on September 8. So if the defense was  
12 contemplating an adjournment request, I think it would be  
13 important to know before then before all those materials are  
14 disclosed.

15 THE COURT: I'm glad you mentioned that, Mr. Roos.  
16 It's a very important point. And I think the defense should  
17 take heed. Certainly an application made after the 3500  
18 material has been produced and witnesses identified puts us in  
19 a whole different realm on the question of an adjournment, and  
20 I'm sure you appreciate that. If I am misapprehending  
21 something about that, Mr. Cohen, you need to tell me now.

22 MR. COHEN: No. We understand, your Honor.

23 THE COURT: Okay. All right. Anything else?

24 Well, I would wish you all a good weekend, but that  
25 would be rubbing salt in an open wound, I understand that.

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1 Have the best ones you can. Thank you very much.

2 MR. REHN: Thank you, your Honor.

3 MS. SASSOON: Thank you, your Honor. You too.

4 (Adjourned)